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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CATHY A. CATTERSON
U.S. COURT OF APPEALS

PATRICK WALLACE; NANCY
WALLACE, dba/Wallace Well Drilling,

Plaintiffs - Appellees,

v.

GEORGE E. FAILING COMPANY,
dba/GEFCO,

Defendant - Appellant.

No. 02-35513

D.C. No. CV-00-00258-PA

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Owen M. Panner, Senior Judge, Presiding

Argued and Submitted November 4, 2003
Portland, Oregon

Before: ALARCON, FERGUSON, and RAWLINSON, Circuit Judges.

The district court acted within its discretion in denying appellant George E. Failing Company's ("GEFCO") motion for new trial or, in the alternative, motion for remittitur. Both sides presented credible evidence on the mitigation issue.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

The jury weighed the evidence and rendered a verdict in favor of the Wallaces. Under these circumstances, the district court's denial of a new trial is virtually unassailable. *See Jones v. City of Long Beach*, 973 F.2d 706, 709 (9th Cir. 1992). The jury carefully considered the evidence offered by both sides as reflected by the size of the award, which was considerably less than the highest amount endorsed by the Wallaces' experts. The fact that the jury gave less credence to the testimony offered by GEFCO's expert did not render the damages award "grossly excessive or monstrous." *See Hemmings v. Tidyman's Inc.*, 285 F.2d 1174, 1192 (9th Cir. 2002).

The district court similarly acted within its discretion when it admitted into evidence the damage estimates calculated by the Wallaces' experts. *See id.* at 1183. An expert's alleged failure to consider all possible variables goes to the weight of the expert evidence and not its admissibility. *See id.* at 1188-89.

AFFIRMED.